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No. 84-1093

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ALEXANDER L. STEVAS,
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

Troy L. Welch and Jay F. Welch,
Appellants,

v.

Claiborne County Beer Board, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF TENNESSEE

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether a state statute which empowers private individuals to prevent the issuance of a permit for the sale of beer by merely appearing and objecting to the license delegates arbitrary and capricious power over the issuance of beer licenses to private individuals in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

2. Whether this state statute deprives the applicant of liberty and property without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

3. Whether this state statute violates the Establishment Clause of the First Amendment to the United States Constitution by having the primary effect of advancing religion, by resulting in an excessive entanglement of church and state, and by favoring one religion over another.*

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* The only other parties not listed in the caption are, as Appellees, Bill Brooks, Whitt Munsey, and Troy Owens, the members of the Claiborne County Beer Board; Claiborne County, Tennessee; Clyde Breeding, Bill M. Brooks, James C. McMurray, Billy Mayes, Kenneth D. Simmons, Kermit Walker, William R. Stanifer, Jr., Lynn Munsey, Haskel Wells, Bruce Seals, Charlie H. McDaniel, Jack Daniels, James C. Nevils, Randle B. Cosby, Joe Whitt Welch, Ron Bryant, Lynn Treece, Marvin Sharp, Ed Thomas, Iveron Grubbs, and Wade Hunter, the members of the Board of Commissioners of Claiborne County, Tennessee; and as Intervenor, William M. Leech, Jr., Attorney General and Reporter for the State of Tennessee. There are no corporate parties.

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IN THE SUPREME COURT OF THE UNITED STATES

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No.

Troy L. Welch and Jay F. Welch,

Appellants,

v.

Claiborne County Beer Board, et al.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF TENNESSEE

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Tennessee filed on October 9, 1984, which upheld the constitutionality of Tennessee Code Annotated section 57-5-105 (f) against appellants' Fourteenth and First Amendment challenges.

OPINIONS BELOW

The opinion of the Supreme Court of Tennessee is reported at 678 S.W. 2d 52 and appears in Appendix A. The opinion of the Chancery Court for Claiborne County, Tennessee, was rendered from the bench and is not reported. The Judgment and the portion of the trial transcript containing the Chancellor's opinion appear in Appendix B. The Decree of the Supreme Court of Tennessee appears in Appendix C. No record was made of the administrative proceedings before the Claiborne County Beer Board.

JURISDICTION

The Opinion and Decree of the Supreme Court of Tennessee were filed October 9, 1984. No rehearing was sought. The judgment of the Supreme Court of Tennessee is final; although the Decree "remands" the case to the trial court, (App. C at C-1),

this remand is purely a formality. No further proceedings apart from the collection of court costs will be had in the trial court, and no further action of the trial court is necessary to effectuate the judgment of the Tennessee Supreme Court. The Notice of Appeal, which appears in Appendix D, was filed in the Supreme Court of Tennessee on December 27, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides in relevant part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

2. The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law respecting an establishment of religion, . . .

3. Tennessee Code Annotated § 57-5-105 (f) (Supp. 1984) provides:

> Class "A" counties, by resolution of their county legislative body, may forbid the sale of beer within three hundred (300) feet of a residential dwelling, measured from building to building, provided the owner of the residential dwelling appears in person before the county beer board and objects to the issuance of such permit or license. This provision shall apply only to land which is unzoned and shall not apply to locations where beer permits or licenses have been issued prior to the date of adoption of such a resolution by the county legislative body, or to an application for a change in the licensee or permitee at such locations.

STATEMENT OF THE CASE

Appellants, Troy L. Welch and his son, Jay F. Welch, operate Frog's Market, a service station and convenience-type food store located on U.S. Highway 25E in Claiborne County, Tennessee. On July 12, 1982, appellants applied to the Claiborne County Beer Board for a permit to sell beer at Frog's Market for off-premises consumption. (App. E at E-3).

The Beer Board met on September 16, 1982, and denied appellants' application. Although the Beer Board keeps no official records of its proceedings (App. E at E-9), the parties stipulated that the sole basis for denial of the permit was the appearance before the Beer Board of Mr. Fred Chumley, who objected to the issuance of a permit to appellants. (App. E at E-9; App. A at A-2). Mr. Chumley's actions invoked the so-called "three hundred foot rule" embodied in Tennessee Code Annotated § 57-5-105 (f) (Supp. 1984).

This rule authorizes the county legislative body to adopt a resolution prohibiting the sale of beer within three hundred feet of a residence if the owner of the residence appears before the county beer board and objects to the issuance of the beer permit. As construed by the Tennessee courts, the statute does not require that the residence owner give any reason for his or her objection. (App. B at B-5).

The "three hundred foot rule" applies only to locations in unzoned commercial areas in "Class A" counties – counties that do not have the metropolitan form of government. Claiborne County is a Class A county, and its legislative body had adopted the resolution authorized by section 57-5-105 (f). Frog's Market is in an unzoned commercial district. (App. E at E-10). Thus, the three hundred foot rule of section 57-5-105 (f) was properly applicable in appellants' case.

Mr. Fred Chumley, who objected to issuance of the permit, resides within three hundred feet of Frog's Market. (App. E at E-11). Before he appeared before the Beer Board, both he and his nephew, the Rev. Claude Chumley, spoke to appellants about their opposition to the beer permit. The Chumleys told appellants that their church was fighting all the beer permit applications in the area. Mr. Fred Chumley told appellants it was his duty to the church to object to the permit, and the Rev. Chumley requested appellants to drop their application. (App. E at E-10, E-11, E-12). Because the Beer Board keeps no records of its proceedings, it is not clear whether Mr. Fred Chumley gave the reason for his objection when he appeared before the Beer Board.

After the Beer Board denied their application, the appellants appealed to the Chancery Court for Claiborne County,

Tennessee, by filing a Petition for Writ of Certiorari and Complaint for Declaratory Judgment (App. E at E-1). The Chancellor conducted a trial *de novo,* as authorized by Tennessee Code Annotated § 57-5-109 (d) (Supp. 1984). Again, Mr. Fred Chumley appeared before the Chancellor and objected to issuance of the permit. He gave no reason for his objection. (App. E at E-11). The Chancellor ruled from the bench, denying appellants' application. The Chancellor found that Frog's Market is a proper location for the sale of beer and that appellants are of proper character. He also found that Mr. Fred Chumley's opposition to the permit was "based on his personal religious beliefs." (App. B at B-4, B-5).

The Chancellor held that Mr. Chumley's objection compelled him to deny appellants' application; but for Mr. Chumley's objection, the Chancellor would have granted the permit. (App. B at B-5; App. A at A-2).

Appellants appealed the Chancellor's ruling directly to the Supreme Court of Tennessee pursuant to Tennessee Code Annotated § 57-5-109 (f) (Supp. 1984). The Supreme Court affirmed the judgment of the Chancery Court without criticism of the Chancellor's findings of fact, rejecting appellants' federal constitutional challenges to the statute. (App. A).

How the questions were raised. The federal constitutional questions raised in this appeal were presented to the Tennessee courts. Paragraphs 13, 14, and 15 of the Petition for Writ of Certiorari and Complaint for Declaratory Judgment in the Claiborne County Chancery Court alleged that the statute violates section 1 of the Fourteenth Amendment to the United States Constitution. (App. E at E-4, E-5) Likewise, appellants' attorney, Mr. McCord, argued before the Chancellor that the denial of the permit solely on the basis of Mr. Chumley's objection was a violation of the Due Process Clause of the Fourteenth Amendment. (App. E at E-12). In his argument, Mr. McCord also raised the First Amendment challenge, relying principally on *Larkin v. Grendel's Den, Inc.,* 459 U.S. 116 (1982), which was decided in December, 1982, after appellants' Petition for a Writ of Certiorari had been filed on November 15, 1982. (App. E at E-12).

The Chancellor ruled on the federal constitutional questions, stating from the bench that "it's my opinion that the statute is constitutional as far as I know. . ." (App. B at B-5). The Chancellor held, "The statute does not require his giving of any reason (for his objection). I think the giving of religious reasons is totally superfluous to the purpose." (App. B at B-5).

On appeal to the Tennessee Supreme Court, appellants raised the Fourteenth and First Amendment questions in their brief and oral argument. The brief and oral argument are the sole methods for presenting questions to the Tennessee Supreme Court since bills of exceptions and writs of error have been abolished. The pleadings and transcript of the Claiborne County Chancery Court hearing were part of the record before the Tennessee Supreme Court.

The Tennessee Supreme Court rejected the federal constitutional challenges to the statute. In so doing, it relied upon its prior opinion in *Davis v. Blount County Beer Board,* 621 S.W.2d 149 (Tenn. 1981). The court apparently disposed of appellants' due process challenges by adopting alternative interpretations of the statute: The resolution authorized by the statute either (1) makes the absence of an objection by the nearby residence owner a requirement for the issuance of a beer permit or (2) prohibits the issuance of a permit for locations within three hundred feet of a residence unless this prohibition is waived by the owner's failure to object. (App. A at A-2, A-3). The court also noted, "It has been repeatedly pointed out by this Court that a license to sell beer is not a contract by right of property but is merely a temporary permit." (App. A at A-4).

The court also rejected appellants' First Amendment challenge. The court stated that the decision in *Larkin v. Grendel's Den* "rested entirely upon First Amendment principles, which are not involved here." (App. A at A-3).

THE QUESTION IS SUBSTANTIAL

This case presents the important question of the extent to which a state can delegate its decision-making power to private individuals consistent with the Fourteenth Amendment. The Tennessee Supreme Court has upheld as constitutional Tennessee Code Annotated section 57-5-105 (f), which delegates

to private individuals the power to deny otherwise-qualified applicants a protected liberty and property right, a permit to sell beer. Under the statute, the homeowner's objection completely deprives the beer board and the Chancery Court of power to grant the permit. The statute empowers private individuals to act arbitrarily and capriciously -- for any reason or for no reason -- and thus purports to delegate power which the state itself does not possess. Thus, the statute places the full coercive power of the state at the disposal of private individuals to exercise as they see fit.

When appellants were denied a beer permit solely because Fred Chumley exercised the power vested in him by the state of Tennessee, they were deprived of their substantive right, guaranteed by the Fourteenth Amendment, to be governed by laws and not by men. They were also deprived of liberty and property without any process at all, in violation of the Fourteenth Amendment. Finally, because Mr. Chumley's objection was based on his religious beliefs, in this case the statute had the primary effect of advancing religion, resulted in an excessive entanglement of church and state, and favored one religion over another in violation of the First Amendment.

Because section 57-5-105 (f) transgresses both the Fourteenth and the First Amendments to the United States Constitution, this Court should note probable jurisdiction to review the judgment of the Tennessee Supreme Court upholding the statute.

1. The State of Tennessee undoubtedly has the power under the Twenty-First Amendment to regulate the sale of alcoholic beverages. Nevertheless, this power must be exercised consistently with the Due Process Clause of the Fourteenth Amendment. *See Wisconsin v. Constantineau,* 400 U.S. 433, 436 (1971). The means of regulating alcoholic beverages embodied in Tennessee Code Annotated section 57-5-105 (f) contravenes the Due Process Clause because it subjects beer permit applicants to the capricious whim of individuals.

This Court has consistently held that laws are unconstitutional if they give private individuals the absolute power to deprive other individuals of something to which they would otherwise be entitled. In a trio of cases decided in the early

years of this century, this Court considered what type of power a state can constitutionally give to private persons. In *Eubank v. City of Richmond,* 226 U.S. 137 (1912), and *Washington ex rel. Seattle Title Trust Co. v. Roberge,* 278 U.S. 116 (1928), this Court invalidated laws which empowered neighboring landowners to prevent other landowners from making an otherwise permissible use of their property. The Court identified two features of the laws in *Eubank* and *Roberge* which rendered them unconstitutional: First, the private individuals' action eviscerated the discretion of the responsible public officials; they had no choice but to act once the landowners exercised their power. *Eubank,* 226 U.S. at 143; *Roberge,* 278 U.S. at 122. Second, the laws set no standards to govern the landowners' exercise of their power; the landowners were free to act "solely for their own interest or even capriciously," *Eubank,* 226 U.S. at 144, or "for selfish reasons or arbitrarily," *Roberge,* 278 U.S. at 122.

In contrast, in *Thomas Cusack Co. v. City of Chicago,* 242 U.S. 526 (1917), this Court upheld an ordinance which prohibited the erection of a billboard without the consent of nearby property owners. The Court interpreted this ordinance as a privately waivable ban: the only power granted to the private individuals was the power to allow another person to do what he or she would otherwise be prohibited from doing. *Id.* at 531.

Thus, under *Eubank, Roberge,* and *Cusack,* the constitutionality of Tennessee Code Annotated section 57-5-105 (f) may depend upon the type of power it gives to the private individuals. In its opinion in this case, the Tennessee Supreme Court attempted to characterize the statute as establishing a privately waivable ban as in *Cusack.* The court stated:

> The claim of appellants that they met all of the requirements for the issuance of a beer permit is incorrect. They met all the requirements except for the location of their site, and this was as plainly in violation of a distance requirement as if they had undertaken to select a site within a prohibited distance from a church or school.

(App. A at A-2, A-3).

However, the court's analysis ignores the vital distinction between the "three hundred foot rule" established by section 57-5-105 (f) and the so-called "two thousand foot rule" applicable to churches and schools established in Tennessee Code Annotated section 57-5-105 (a) (3).*

If a county legislative body chooses to prohibit the sale of beer within two thousand feet of a church or school, under the statute that prohibition must be absolute. The prohibition does not depend for its efficacy upon the action of private individuals. Thus, Frog's Market was "in violation of a distance requirement" in this case solely by virtue of Fred Chumley's religiously motivated action.

The resolution authorized by section 57-5-105 (f) does not create an absolute prohibition on the sale of beer within three hundred feet of a residence; the prohibition is conditional, and is effective only *"provided* the owner of the residential dwelling appears in person before the county beer board and objects to the issuance" of the permit. Tenn. Code Ann. § 57-5-105 (f) (emphasis added). Also, in its opinion in *Davis v. Blount County Beer Board,* 621 S.W. 2d 149, 152 (Tenn. 1981), the Tennessee Supreme Court construed the statute as follows: "The permits

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*Tenn. Code Ann. § 57-5-105 (a) (3) (Supp. 1984) provides in relevant part as follows:

> (a) Before any person, firm, corporation, joint-stock company, syndicate or association shall be authorized to sell, store and/or manufacture such beer and/or beverages as prescribed herein, in any class A county outside the limits of any town or city now incorporated he shall apply to the county legislative body or to a committee appointed by the county legislative body, and shall establish:
>
> . . . .
>
> (3) That no such beverages will be sold except at places where such sale will not cause congestion of traffic or interference with schools, churches, or other places of public gathering, or otherwise interfere with public health, safety and morals; the county legislative body having the right to forbid such storage, sale or manufacture at places within two thousand (2,000) feet of such places of public gatherings in its discretion. . . .

must issue to an otherwise qualified applicant *unless* the owner of a residence within 300 feet appears in person and protests." (Emphasis added). Thus, the statute does not authorize a prohibition that can be waived by private action; rather, it authorizes a prohibition that comes into being only via private action. This private action is ungoverned by any standards and, as contrued by the Tennessee courts, totally deprives the public officials of any discretion to grant the permit once the objection has been made. (App. B at B-5). Section 57-5-105 (f) authorizes private action of the standardless, discretion-robbing type struck down in *Eubank* and *Roberge. See also North Carolina Association for Retarded Children v. North Carolina,* 420 F. Supp. 451 (M.D.N.C. 1976) (invalidating statute giving retarded person's next of kin power to force county official to petition for involuntary sterilization of the retarded person).

In contrast, in *New Motor Vehicle Board v. Orrin W. Fox Co.,* 439 U.S. 96 (1978), this Court upheld a California statute that provided for review by a neutral governmental body upon private individuals' protests of the establishment of new automobile franchises. The Court rejected a due process challenge to the statute, emphasizing that the private individuals' "(p)rotests serve only to trigger Board action." *Id.* at 110. Unlike the California statute, section 57-5-105 (f) authorizes private action that ends the neutral adjudication. In effect, the private protest *is* the adjudication under the Tennessee statute.

This Court's emphasis on the arbitrary and capricious nature of the landowners' power in *Eubank* and *Roberge* points up an independent reason why section 57-5-105 (f) is unconstitutional: it purports to delegate to private persons a power the state itself does not possess. *See Coe v. Gerstein,* 376 F. Supp. 695, 698 (S.D. Fla. 1973) (three-judge court) (invalidating parental or spousal consent provision of Florida abortion statute on grounds "the State may not statutorily delegate to husbands and parents an authority the State does not have."), *appeal dismissed,* 417 U.S. 279 (lack of jurisdiction), *aff'd, id.* at 281 (on issue of district court's refusal to grant TRO). A state may not act arbitrarily and capriciously, even in exercising its police powers. *See Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 395 (1926). Some reasons for state action are impermissible under the Constitution. *See Perry v. Sindermann,* 408 U.S. 593, 597 (1972)

(exercise of First Amendment rights); *Loving v. Virginia,* 388 U.S. 1, 12 (1967) (individual's race). Likewise, a state may not act for no reason at all, purely randomly or whimsically, because even the most sovereign of state actions must have a rational basis. *See Nebbia v. New York,* 291 U.S. 502, 537 (1934).

Yet, section 57-5-105 (f) empowers private individuals to act for no reason at all, purely whimsically, since the statute, as interpreted by the Tennessee courts, does not require the homeowner to give a reason for his or her objection. (App. B at B-5). Indeed, the statute empowered Fred Chumley to act for impermissible reasons, on the basis of his religious beliefs. Mr. Chumley's objection could just as easily have rested on his dislike of appellants' race or ethnic origin, reasons for which the state itself could not have acted. As Justice Stevens has pointed out, "a legislative abdication of power to private citizens who are prone to act arbitrarily is no less unconstitutional than the arbitrary exercise of that power by the state officials themselves." *New Motor Vehicle Board v. Orrin W. Fox Co.,* 439 U.S. 96, 126 n.30 (1978) (dissenting opinion); *see also Smith v. Ladner,* 288 F. Supp. 66, 68 (S.D. Miss. 1968) (grant of unfettered, standardless discretion to state attorney general to issue or refuse to issue corporate charters is unconstitutional).

2. Appellants have been deprived of protected liberty and property interests without due process of law by the operation of Tennessee Code Annotated section 57-5-105 (f). Appellants possess both protected property and liberty interests in their beer permit. Appellants have a property interest in the permit because, having complied with all the statutory requirements for its issuance, they have a "legitimate claim of entitlement" to it. *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972). Therefore, in adjudicating appellants' application, the state and its subdivision, the county, must give appellants whatever process is due them. *See Hornsby v. Allen,* 326 F. 2d 605, 608-09 (5th Cir. 1964) (application for liquor license), *cited with approval in Goldberg v. Kelly,* 397 U.S. 254, 262 n.9 (1970).

Although the Tennessee Supreme Court has said, "There is no property right in a permit to sell beer," *Needham v. Beer Board,* 647 S.W. 2d 226, 231 (Tenn. 1983); *see* App. A at A-4, this statement is clearly based on the outmoded right/privilege distinction that has been conclusively rejected by this Court. *See*

Board of Regents v. Roth, 408 U.S. 564, 571 (1972); *see also Barry v. Barchi,* 443 U.S. 55, 64 (1979) (racehorse trainer's license); *Bell v. Burson,* 402 U.S. 535, 539 (1971) (driver's license).

In addition to a protected property interest, appellants also have a protected liberty interest in the beer permit. The right to engage in a particular occupation is a liberty interest protected by the Due Process Clause. *See Hampton v. Mow Sun Wong,* 426 U.S. 88, 102-03 & n.23 (1976); *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923).

Since appellants have protected interests in the beer permit, they were entitled to due process of law before they could be deprived of it. Most of the procedural due process cases decided by this Court have involved the question of what process was due and whether that process was given. It seems clear, at least, that a person may not be deprived of a protected interest "without any process at all." *New Motor Vehicle Board v. Orrin W. Fox Co.,* 439 U.S. 96, 122 n.24 (1978) (Stevens, J., dissenting).

Yet that is precisely the effect of section 57-5-105 (f). The private individual's objection brings the process of adjudication to a screeching halt. Once Fred Chumley objected, there was absolutely nothing appellants could say or do to defeat the protest, nor was there any decision for the beer board or the Chancellor to make. Section 57-5-105 (f) thus renders meaningless the applicant's right to appear before the beer board and the right to appeal to the Chancellor, violating the due process requirement of a "meaningful" opportunity to be heard. *See Fuentes v. Shevin,* 407 U.S. 67, 80 (1972).

Section 57-5-105 (f) violates the Due Process Clause of the Fourteenth Amendment because it allows private persons to effect a permanent, final, binding, and unreviewable deprivation of protected liberty and property interests. *Cf. New Motor Vehicle Board v. Orrin W. Fox Co.,* 439 U.S. 96, 121, 122 n.24 (1978) (Stevens, J., dissenting) (even temporary deprivation of protected interest at behest of private individual violates Due Process Clause).

3. Tennessee Code Annotated section 57-5-105 (f) violates the Establishment Clause of the First Amendment because its primary effect is to advance religion, it results in an excessive

entanglement of church and state, and it favors one religion over another. Although the statute may well have a secular purpose, as required by *School District v. Schempp,* 374 U.S. 203 (1963), the statute fails the concomitant requirement that its primary effect neither advance nor inhibit religion. *Id.* at 222. Because protesting homeowners need not give any reason for their protest, the denial of a permit can be wholly unrelated to any permissible consideration of public health, safety, or welfare. Indeed, in this case, the denial resulted solely from one man's religious beliefs. Because a deeply religious person whose religion teaches that alcohol is evil may well be more likely to object to a permit than others might be, the statute clearly provides an excellent opportunity for those religious persons to give graphic effect to their beliefs. The statute is "clearly susceptible to being used to promote religious rather than secular ends." J. Nowak, R. Rotunda & J. Young, *Constitutional Law* 1046 n.6 (2d ed. 1983). A statute that instructs a beer board and the Chancellor to deny a beer permit solely because of one person's religious convictions has the primary effect, vividly demonstrated in this case, of advancing religion.

Second, the statute fails the "excessive entanglement" test. *Lemon v. Kurtzman,* 403 U.S. 602, 613 (1971). Proscribed excessive entanglement was clearly evident in *Larkin v. Grendel's Den, Inc.,* 459 U.S. 116 (1982), because the statute there expressly conferred the veto power over liquor licenses upon churches, rather than upon private individuals. Nevertheless, excessive entanglement is no less present in this case. Here, churches can do indirectly what they could have done directly under the Massachusetts statute. There was evidence here that Fred Chumley was acting merely as the agent of his church. (App. E at E-10). Assuming that some members of the appellants' community favored the grant of a beer permit for Frog's Market, Fred Chumley's exercise of devotion to his church created the danger of "(p)olitical fragmentation and divisiveness on religious lines" that the Establishment Clause was designed to prevent. *Lemon v. Kurtzman,* 403 U.S. 602, 623 (1971).

Section 57-5-105 (f) also impermissibly favors one religion over another. *See Everson v. Board of Education,* 330 U.S. 1 (1947). Religions that look with disfavor upon alcoholic beverages are advanced by their adherents' state-conferred

ability to prevent the grant of beer permits. Religions that favor alcohol have no parallel state-conferred right to promote beer permits.

The Tennessee Supreme Court ruled that First Amendment principles "are not involved here," apparently because that court "has not construed the Tennessee statute as conferring a 'veto power' upon churches or religious establishments." (App. A at A-3). However, the fact that section 57-5-105 (f) confers the veto power upon persons in addition to church agents and religious individuals does not eliminate its unconstitutional effects. Section 57-5-105 (f) vests private individuals with coercive civil authority which they may utilize based upon their religious beliefs, and restores the ill-fated "fusion of governmental and religious functions" that the Establishment Clause was designed to forbid. *School District v. Schempp,* 374 U.S. 203, 222 (1963). The denial of a beer permit to appellants on the basis of Mr. Chumley's objection embodies the central evil of the establishment of religion: "religious . . . control over our democratic processes." *Wolman v. Walter,* 433 U.S. 229, 263 (1977) (Powell, J., concurring and dissenting).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

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APPENDICES

APPENDIX A

Opinion of the Supreme Court of Tennessee

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

For Publication.
October 9, 1984

TROY L. WELCH and
JAY F. WELCH,

Plaintiffs-Appellants,

vs.

Claiborne Equity
Hon. Billy Joe White,
Chancellor

CLAIBORNE COUNTY BEER
BOARD, ET AL.,

Defendants-Appellees.

For Plaintiffs-Appellants:

Keith McCord
Judy M. Cornett
Knoxville, Tennessee

For Defendants-Appellees:

William R. Stanifer
Tazewell, Tennessee

For Intervenor, the Attorney General for the State of Tennessee

Kate Eyler
Assistant Attorney General

Of Counsel:

William M. Leech, Jr.
Attorney General

OPINION

AFFIRMED AND REMANDED. HARBISON, J.

Appellants applied for a permit for the sale of beer for off-premises consumption. Their application was denied solely upon the ground that the site leased by them was within three hundred feet of a private residence and that the owner of the residence objected to the issuance of the permit. Appellants met all other requirements for the issuance of the permit, and it would have been granted to them except for the fact that their store was within the prescribed distance from the residence.

The Chancellor upheld the action of the Beer Board, and we affirm.

To a large extent this case is governed by the decision of this Court in Davis v. Blount County Beer Board, 621 S.W. 2d 149 (Tenn. 1981), in which the statute authorizing prohibition of the sale of beer within three hundred feet of a residential dwelling was upheld. T.C.A. § 57-5-105 (f). Most of the same arguments advanced by appellants in the present case were considered and rejected by the Court in that case, and most of the same authorities relied upon by appellants were discussed in that opinion.

In Davis, this Court held that there was no unauthorized delegation of legislative power to individuals, and that, indeed, there was no delegation at all. Rather, the statute authorized local legislative bodies to prohibit the sale of beer within a prescribed distance from a residence, and this prohibition was absolute, unless waived by the affected occupants of residential dwellings.

There is no question but that Claiborne County had adopted a resolution in accordance with T.C.A. § 57-5-105 (f) in 1975, and there is no claim that it has been discriminatorily or selectively enforced or applied. Accordingly, appellants are bound thereby, and the site which they leased does not meet the geographical requirements properly prescribed by the County. The claim of appellants that they met all of the requirements for the issuance of a beer permit is incorrect. They met all the requirements

except for the location of their site, and this was as plainly in violation of a distance requirement as if they had undertaken to select a site within a prohibited distance from a church or school.

We have considered all of the arguments advanced by appellants, but we are not persuaded to depart from the previous holding of this Court in the Davis case, supra. We have carefully considered the contention of appellants that the application and enforcement of the distance requirement in the present case violate the Establishment Clause of the United States Constitution and its state counterpart. In this respect appellants rely principally upon the decision of the Supreme Court of the United States in Larkin v. Grendel's Den, Inc., 459 U.S. 116, 103 S. Ct. 505, 74 L. Ed. 2d 297 (1982).

An examination of that case reveals that it rested entirely upon First Amendment principles, which are not involved here. In that case, state courts had construed a Massachusetts statute as conferring a "veto power" upon churches and schools with respect to the location of establishments selling liquor. The majority of the Supreme Court held that the statute, as thus construed, violated the Establishment Clause of the First Amendment to the United States Constitution.

This Court has not construed the Tennessee statute as conferring a "veto power" upon churches or religious establishments. There are separate statutory provisions containing distance requirements from churches and schools. The statute in question here involves private residences only. Further, this Court, in the Davis case, supra, said:

> "The protesting owner of a residence located within 300 feet of the proposed beer outlet exercises no legislative power; he merely protests or fails to protest. He can neither grant nor deny a permit for the sale of beer. The permits must issue to an otherwise qualified applicant unless the owner of a residence within 300 feet appears in person and protests. The effect of a protest is to deny the permit, but that effect is derived from the legislative enactment and the ordinance passed pursuant thereto, not from the residence owner." 621 S.W. 2d at 152.

Appellants further contend that in the present case the county officials should be estopped from denying a permit because the local resolution adopting the distance requirement involved was not a matter of public record and was unknown to the appellants until after they had invested in their premises.

This contention is without merit both factually and legally. It appears without question that the resolution had been validly adopted by the Quarterly County Court in 1975 and that it was a matter of public record. It was not properly indexed by the County Court Clerk, but certainly between the time of the filing of the application and the hearing thereon, its existence was known to appellants. Mr. Troy Welch testified that he had a conversation with the objecting property owner, Mr. Fred Chumley, before a hearing was held on his application by the local beer board. Mr. Chumley advised Mr. Welch that he did object to the issuance of the permit, the site for which was only one hundred thirty-eight feet from the Chumley residence. The record simply does not establish that Mr. Welch expended substantial amounts of money relying upon the absence of a residence requirement, nor is it established in the record when his expenditures were in fact incurred. No basis for estoppel or waiver has been established. It has been repeatedly pointed out by this Court that a license to sell beer is not a contract by right of property but is merely a temporary permit. See Needham v. Beer Board of Blount County, 647 S.W. 2d 226, 230-231 (Tenn. 1983). If appellants expended money before applying for their permit on the expectation that it would be issued, they did so prematurely, and this fact affords no basis for estoppel against or waiver by the county regulatory body.

The judgment of the Chancellor is affirmed at the cost of appellants. The cause is remanded to the trial court for any further proceedings which may be necessary.

S/William J. Harbison
WILLIAM J. HARBISON, JUSTICE

Cooper, C.J., Fones, Brock
and Drowota, JJ., concur.

APPENDIX B

1. Judgment of the Chancery Court for Claiborne County

IN THE CHANCERY COURT FOR CLAIBORNE COUNTY, TENNESSEE

TROY L. WELCH and JAY F. WELCH,

Plaintiffs

vs. No. 5729

CLAIBORNE COUNTY BEER BOARD, et al.,

Defendants

JUDGMENT

This cause came on for final hearing on the 17th day of June, 1983, before the honorable Billy Joe White, Chancellor, upon the Petition for Writ of Certiorari and Declaratory Judgment, the Answer thereto, the Intervening Petition of the Attorney General for the State of Tennessee, the testimony of witnesses, arguments of counsel and the record as a whole, all of which was considered by the Court. At the conclusion of said hearing the Court concluded that the Claiborne County Beer Board acted within its authority in denying a beer license to plaintiffs, and accordingly, plaintiffs were not entitled to relief in this cause. The Court's findings of fact and conclusions of law were stated in open Court and reduced to writing by the court reporter, which findings of fact and conclusions of law are made a part of the record in this cause.

It is therefore ORDERED and ADJUDGED that the relief sought by the plaintiffs in their Petition for Writ of Certiorari and Declaratory Judgment be, and the same hereby is, denied.

It is further ORDERED and ADJUDGED that the action of the Claiborne County Beer Board in denying the plaintiffs' beer license be, and the same hereby is, sustained.

The costs of this cause are taxed to the plaintiffs for which execution may issue.

ENTER this 26 day of October, 1983.

S/B.J. White
CHANCELLOR

APPROVED FOR ENTRY:

S/Kate Eyler
Kate Eyler
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219

S/William R. Stanifer
William R. Stanifer
Attorney at Law
P.O. Box 203
Tazewell, Tennessee 37879

S/Keith McCord
Attorney at Law
P.O. Box 2046
Knoxville, Tennessee 37901

MB-31
P-120-121

THEREUPON Court was adjourned until October 27, 1983.

S/BILLY JOE WHITE
CHANCELLOR

2. Transcript of Memorandum Opinion rendered from the bench.

IN THE CHANCERY COURT FOR CLAIBORNE COUNTY
STATE OF TENNESSEE

TROY L. WELCH and
JAY F. WELCH,

Plaintiffs

versus No. 5729

CLAIBORNE COUNTY BEER
BOARD, et al.,

Defendants

.....

Transcript of proceedings as had upon the trial of the above-styled cause before the Honorable Billy Joe White, Chancellor, holding the Chancery Court at Tazewell, Tennessee, on the 17th day of June, 1983.

* * *

MEMORANDUM OPINION

THE COURT: Gentlemen, there are several issues in this case, and I hope I make disposition to all of them. Defendant pretty much stipulated, and the Court would find, that the particular location in this application would be a proper place physically located to have a beer permit. It's been stipulated that the Welch's have no character problems that would interfere with them being the holders of a beer permit in this county, and there is two other business places adjoining their business that have beer licenses that were issued prior to the county adopting the resolution concerning the three hundred foot rule. Of course, when this application was made, there was a residence within three hundred foot, the county has adopted the resolution in question. It was of record although not properly indexed. Admittedly the Beer Board considered little or nothing else except the three hundred foot rule and denied the application on the basis that there is a residence a hundred and thirty-eight feet from the petition. So I would find that by stipulation and by evidence and by common knowledge, this would be a proper place under the law for a beer license. There is no evidence of any real problem at that place.

This is not a part of the Opinion in this case, but I would a little bit disagree with counsel on Bill and Cathy's Market. I never thought Bill and Cathy's Market was a proper place for a beer license. That one is a traffic hazard. I didn't have anything to do with that case, and don't have anything to do with it now. Actually, Frog's Market is much, much better located traffic-wise than other places, but that is all water over the dam. I probably would not have issued that license because of the difficulty with the traffic. People that go into that market have to go out and go south on U.S. 25 E, and they cut across over in this divided four lane, and they have to make a left turn, stop and cut back into traffic, and I think it's a traffic hazard. But this place is not controlled by that particular problem and I'm not holding that. This one has access on Old Highway 63 with a proper cross-over and it's not a traffic hazard.

Get down to simply as I see it, the question of the three hundred foot rule, Fred Chumley came into the Beer Board hearing, and he comes into this Court where the trial is de novo and testified that he is opposed to the issuance of this license,

and his particular opposition is based on his personal religious beliefs. The statute does not require his giving of any reason. I think the giving of religious reasons is totally superfluous to the purpose. He did object and it could have been on the reason that he didn't like Mr. Welch, which is not the case, and I think any reason he gave under this statute is adequate. It happens to be that he gave religious reasons. I don't think that reason is important. That statute just says that counties may or counties have the authority if they so elect to pass resolutions declaring that anyone living within three hundred foot of a residence cannot have a beer permit if that person object. I have tried cases where people did not object. I have tried very few where they actually do, and it's my opinion that the statute is constitutional as far as I know, and in these cases that it is proper where the counties pass the resolution to deny these beer applications on the basis of the three hundred foot rule, and I so deny this one, based solely on that rule, and again reiterating that I would issue the license to Mr. Welch if that were not the situation because he's a proper person and the location is all right. I don't think that the fact that there is two other licenses issued prior to this statute being in effect, prior to the resolution, affects his application. I think it has to rest on its own two feet, and I cannot abrogate the statute of this county and would not where the county has elected under that statute to exercise their authority to declare that to be their policy. And my policy is to follow the law, and as far as I know in all beer cases, if the people comply in all respects, I issue beer permits, that's the law. Personal belief has nothing to do with it. In cases where the applicants do not comply with the law, I deny them. That again has nothing to do with personal belief, that's the law.

So, gentlemen, my opinion is that the county has established a three hundred foot rule in this county, and this petitioner is in violation of that rule and their petition should be denied.

Is there any additional ruling in any of the issues that I have overlooked? I want to give you a clear shot at it.

APPENDIX C

Decree Appealed From

SUPREME COURT OF TENNESSEE, AT KNOXVILLE
SEPTEMBER TERM 1984

Filed October 9, 1984
John A. Parker, Clerk

DECREE

TROY L. WELCH and JAY F. WELCH,

Plaintiffs-Appellants

VS. Claiborne Equity

(No. 5727)

CLAIBORNE COUNTY BEER
BOARD, ET AL., AFFIRMED AND REMANDED

Defendants-Appellees

This cause coming on to be heard upon a transcript of record from the Chancery Court of Claiborne County, assignments of error, reply brief and argument of counsel, upon consideration whereof the Court is of opinion that in the decree of the Chancellor there is no error.

It is therefore ordered and decreed by the Court that the decree of the Chancellor be in all things affirmed and that this cause be and hereby is remanded to the trial court for any further proceedings which may be necessary consistent with the Opinion of this Court, a copy of which shall accompany the procedendo on the remand to the trial court.

All costs of the cause are adjudged against the Appellants, Troy L. Welch and Jay F. Welch, and sureties, McCord, Cockrill & Weaver, Attorneys, and execution may issue from this Court for the costs incident to the appeal. This cause is remanded to

the trial court aforesaid for the collection of the costs adjudged therein, in the manner provided by law.

William J. Harbison, J.
Robert E. Cooper, C.J.
Wm. H.D. Fones, J.
Ray L. Brock, Jr., J.
Frank F. Drowota, III., J.

APPENDIX D

Notice of Appeal

IN THE SUPREME COURT OF TENNESSEE

TROY L. WELCH AND JAY
F. WELCH,

Appellants,
VS. No. 5727

CLAIBORNE COUNTY BEER
BOARD, ET AL.

Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Troy L. Welch and Jay F. Welch, Appellants, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Tennessee affirming the judgment of the Chancery Court for Claiborne County entered on October 9, 1984.

This appeal is taken pursuant to 28 U.S.C. § 1257 (2).

S/Keith McCord/JMC
KEITH McCORD

S/Judy M. Cornett
JUDY M. CORNETT

ATTORNEYS FOR APPELLANTS

McCORD, COCKRILL & WEAVER, P.C.
POST OFFICE BOX 2046
KNOXVILLE, TENNESSEE 37901
(615) 637-5252

CERTIFICATE OF SERVICE

Pursuant to Rule 28.5 (b) of the United States Supreme Court, I hereby certify that I, a member of the Bar of the United States Supreme Court, have this day served a true and exact copy of the foregoing Notice of Appeal upon all parties required to be served by placing same in the United States mail, with first-class postage prepaid, addressed to counsel of record at his or her post office address, as follows:

William R. Stanifer
Stanifer & Stanifer
P.O. Box 203
Tazewell, Tn 37879

Attorney for Claiborne County Beer Board; Claiborne County, Tennessee; and all individual appellees.

Kate Eyler
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tn 37219

Attorney for William M. Leech, Jr., Attorney General and Reporter for the State of Tennessee.

This 27th day of December, 1984.

S/William G. Cockrill
WILLIAM G. COCKRILL

APPENDIX E

1. Appellants' Petition for Writ of Certiorari and Complaint for Declaratory Judgment (without exhibits)

IN THE CHANCERY COURT OF CLAIBORNE COUNTY, TENNESSEE

TROY L. WELCH and
JAY F. WELCH,

Plaintiffs,

VS. No. 5729

CLAIBORNE COUNTY BEER BOARD, Claiborne County, Tennessee, and BILL BROOKS, WHITT MUNSEY and TROY OWENS, the members of the Claiborne County Beer Board; CLAIBORNE COUNTY, TENNESSEE; and CLYDE BREEDING, BILL M. BROOKS, JAMES C. McMURRAY, BILLY MAYES, KENNETH D. SIMMONS, KERMIT WALKER, WILLIAM R. STANIFER, JR., LYNN MUNSEY, HASKEL WELLS, BRUCE SEALS, CHARLIE H. McDANIEL, JACK DANIELS, JAMES C. NEVILS, RANDLE B. COSBY, JOE WHITT WELCH, RON BRYANT, LYNN TREECE, MARVIN SHARP, ED THOMAS, IVERON GRUBBS, WADE HUNTER, the Board of Commissioners of Claiborne County, Tennessee, and WILLIAM M. LEECH, JR., ATTORNEY GENERAL of the State of Tennessee;

Defendants.

PETITION FOR WRIT OF CERTIORARI AND COMPLAINT FOR DECLARATORY JUDGMENT

COME the plaintiffs, by and through their undersigned attorney, and petition this court for a Writ of Certiorari directed to the defendant Claiborne County Beer Board and its members, Bill Brooks, Whitt Munsey and Troy Owens, and for a declaration of the validity of T.C.A. § 57-5-105 (1982 Supp.) and a resolution of the County of Claiborne, Tennessee, and for a declaration of their rights under said statute and resolution, and in support thereof state as follows:

1. Plaintiffs bring this action for a Writ of Certiorari, with a trial de novo, as a substitute for an appeal, pursuant to the provisions of T.C.A. § 57-5-109 (d), (e) and (f).

2. Plaintiffs bring this action for a declaratory judgment pursuant to the provisions of T.C.A. § 29-14-101, et. seq., to determine the validity of T.C.A. § 57-5-105 (1982 Supp.) a copy of which is attached as Exhibit 1 and made a part hereof by reference, and a resolution of Claiborne County, Tennessee (described hereinafter) and to determine their rights under said statute and resolution, said declaratory judgment action to be in addition to and/or in the alternative to the petition for Writ of Certiorari described in paragraph 1 above.

3. Plaintiffs, Troy L. Welch and Jay F. Welch, are citizens and residents of Claiborne County, Tennessee, with addresses at P.O. Box 498, Harrogate, Tennessee, and operate Frog's Market, a service station and market, located in Claiborne County, Tennessee.

4. At all times material hereto, the defendant Claiborne County, Tennessee, acting through its duly elected board of commissioners consisting of Clyde Breeding, Bill M. Brooks, James C. McMurray, Billy Mayes, Kenneth D. Simmons, Kermit Walker, William R. Stanifer, Jr., Lynn Munsey, Haskel Wells, Bruce Seals, Charlie H. McDaniel, Jack Daniels, James C. Nevils, Randle B. Cosby, Joe Whitt Welch, Ron Bryant, Lynn Treece, Marvin Sharp, Ed Thomas, Iveron Grubbs, and Wade Hunter, was empowered and had the purported authority, pursuant to T.C.A. § 57-5-105, to make and issue resolutions pertaining to the sale, storage and manufacture of beer in

Claiborne County (a county not governed by a metropolitan government) outside the limits of any incorporated town or city in said county.

5. The defendant Claiborne County, Tennessee, purported to delegate its authority described in paragraph 4 above to the defendant Claiborne County Beer Board, a board or committee appointed by the Claiborne County legislative body, which board, at all times material hereto, acted through its duly appointed members, Bill Brooks, Whitt Ramsey and Troy Owens.

6. Defendant William M. Leech, Jr., Attorney General of the State of Tennessee, is made a party defendant pursuant to the provisions of T.C.A. § 29-14-107 (b).

7. Plaintiffs believe upon information that, sometime prior to July 12, 1982, the County of Claiborne, Tennessee, adopted a resolution, in accordance with the purported authority of T.C.A. § 57-5-105 (f), forbidding the sale of beer within 300 feet of a residential dwelling provided the owner of the residential dwelling appears in person before the county beer board and objects to the issuance of such permit. Plaintiffs are unable to attach a copy of said resolution to this petition because representatives of Claiborne County and the Claiborne County Beer Board were unable to locate said resolution in the duly recorded minutes and records of Claiborne County.

8. On or about July 12, 1982, the plaintiffs made application to the Claiborne County Beer Board for the issuance of a beer permit to sell package beer at their business known as Frog's Market located on U.S. 25E, Harrogate, Tennessee. A copy of plaintiffs' Application for Beer Permit is attached as Exhibit 2 and made a part hereof by reference.

9. Plaintiffs tendered the required fee of $100 along with their application and fully complied with all the conditions and provisions of T.C.A. § 57-5-105.

10. On or about September 16, 1982, the Claiborne County Beer Board met and denied the plaintiffs' application solely on the basis that a person appeared before the Board and objected

to the application because his residence was allegedly within 138 feet of Frog's Market.

11. At the time the application was denied, the Beer Board had no evidence before it which justified the denial or showed the granting of the application to sell beer at that location would endanger the public health, safety and morals of Claiborne County.

12. The action of the Beer Board in denying plaintiffs' application is an unreasonable, arbitrary and capricious abuse of discretion and bears no reasonable relation to the public health, safety and morals of Claiborne County.

13. Tenn. Code Ann. § 57-5-105 and the resolution adopted by Claiborne County described herein are invalid and void on their face and as applied to the plaintiffs and are in violation of Article 1, § 8, Article 2, § 2 and Article 11, § 8 of the Constitution of Tennessee and Amendment 14, § 1 of the Constitution of the United States for the following reasons:

(a) The provisions of T.C.A. § 57-5-105 purport to delegate legislative authority to counties and beer boards or other committees established by counties to regulate the sale, storage and manufacture of beer but provide no objective standards, guidelines or measures by which the County and/or Beer Board can carry out the purported delegated authority. The statute merely sets forth specific information that must be established by an applicant but enumerates no standards, guidelines or measures by which the County and/or Beer Board must judge the applicant. Consequently, arbitrary and unbridled power is delegated to the County and/or Beer Board to grant or refuse beer permits, and such arbitrary power is an unlawful grant of legislative power from the State to the County and/or Beer Board.

(b) The provisions of T.C.A. § 57-5-105 further result in the unlawful delegation of legislative power because the statute makes the County and/or Beer Board the exclusive judge as to whether an applicant is competent to hold a beer permit, thus the County and/or Beer Board make the law rather than the General Assembly of Tennessee.

(c) The provisions of T.C.A. § 57-5-105, particularly paragraph (f), result in the unlawful delegation of legislative power because the statute permits the appropriate County body to enact a resolution that makes a private citizen the exclusive judge as to whether an applicant is competent to hold a beer permit by allowing the application to be denied solely upon objection of a private citizen, thus private citizens make the law rather than the General Assembly of Tennessee.

(d) The resolution purportedly adopted by Claiborne County, Tennessee, results in the unlawful delegation of legislative power because the resolution makes a private citizen the exclusive judge as to whether an applicant is competent to hold a beer permit by allowing the application to be denied solely upon objection of a private citizen, thus private citizens make the law rather than the General Assembly of Tennessee.

(e) The provisions of T.C.A. § 57-5-105 and the County resolution directly result in unreasonable restraint in the granting a beer permits, bear no relation to nor promote public health, safety and morals and unreasonably invade the rights of the plaintiffs and other citizens similarly situated to pursue lawful businesses. Thus, the statute and resolution result in the improper and unreasonable exercise of police power.

14. The procedures for granting and denying applications for beer permits provided by T.C.A. § 57-5-105 and the resolution adopted by Claiborne County described herein and the procedures subsequently followed in denying plaintiffs' application for a beer permit are in violation of Article 1, § 8, of the Constitution of Tennessee and Amendment 14, § 1 of the Constitution of the United States.

15. The defendants have violated the above-described constitutional provisions and statutes, which violations have been to the detriment of plaintiffs, have hindered and inhibited plaintiffs in the lawful pursuit of their business and which threaten to continue to deprive plaintiffs of their rights.

WHEREFORE, plaintiffs request the following relief:

1. That a Writ of Certiorari issue to the Claiborne County Beer Board, Claiborne County, Tennessee, and its members, requiring them to forward to this court a certified copy of the transcript of the proceedings had before the Beer Board on or about September 16, 1982, together with all permits, orders, applications, minutes, tape recordings and resolutions relating to plaintiffs' application for a beer permit and that this court review the action of the Claiborne County Board and grant a trial de novo as a substitute for an appeal.

2. In addition to and/or in the alternative to the relief requested in paragraph 1 above, the plaintiffs request that this complaint be filed as an action for declaratory judgment under T.C.A. § 29-14-101, et. seq.

3. That the court annul and vacate the action of the Claiborne County Beer Board in denying plaintiffs' application for a beer permit and grant plaintiffs' application.

4. That the court declare that T.C.A. § 57-5-105 and the resolution of Claiborne County adopted pursuant to said statute be null and void for the reasons set forth in this petition.

5. For such other, further and general relief to which they may be entitled.

THIS IS THE FIRST APPLICATION FOR THE WRIT OF CERTIORARI IN THIS CAUSE.

S/Keith McCord
Keith McCord

S/Sherrie Greene Willman
Sherrie Greene Willman

Attorneys for Plaintiffs

OF COUNSEL:

McCord & Cockrill, P.C.
2232 United American Plaza
P.O. Box 2046
Knoxville, TN 37901
615/637-5252

OATH

STATE OF TENNESSEE

SS.

COUNTY OF KNOX

Keith McCord, Attorney for plaintiffs herein, having been duly sworn, makes oath that the facts and statements contained in the foregoing petition are true except as to those matters alleged on information and belief, and those matters he verily believes to be true.

S/Keith McCord
Keith McCord

Sworn to and subscribed before me
this 15th day of November, 1982.

S/Katherine J. Taylor
Notary Public

My Commission expires: 8-19-85

COST BOND

We acknowledge ourselves sureties for the costs of this cause not to exceed Two Hundred Fifty Dollars ($250.00).

McCord & Cockrill, P.C.
By: S/Keith McCord

2. Excerpts from transcript of hearing before the Chancellor

IN THE CHANCERY COURT FOR CLAIBORNE COUNTY
STATE OF TENNESSEE

TROY L. WELCH and
JAY F. WELCH,

Plaintiffs

versus No. 5729

CLAIBORNE COUNTY BEER
BOARD, et al.,

Defendants

.....

Transcript of proceedings as had upon the trial of the above-styled cause before the Honorable Billy Joe White, Chancellor, holding the Chancery Court at Tazewell, Tennessee, on the 17th day of June, 1983.

1. (Opening argument, Tr. page 4, lines 8-14):

MR. STANIFER (for the defendants): Your Honor, I would stipulate that there is no record at the Courthouse of any minutes kept by the Beer Board. I talked with Mr. Brooks here on the matter just now, and the only records or minutes that have been kept for the last several years are in his possession. They are not on record anywhere in the Courthouse.

2.(Opening argument, Tr. page 5, lines 4-9, 13-23; page 6, lines 8-22):

MR. McCORD: . . . the sole purpose or grounds for denying the plaintiff's application for Beer Board was on the basis of the three hundred foot rule of T.C.A. —— let me get that statute 57-5-105, I believe that's correct. And can we stipulate that?

. . . .

MR. STANIFER: Yes, your Honor, and as far, as far as we're concerned, we'll stipulate that that's the sole question before this Court, and we would be able to stipulate this that it would be the three hundred foot rule. I'm certain that the applicants in this case are fine people, and certainly we do not attack their integrity or anything like that.

. . . .

MR. McCORD: Your Honor, in -- I call the Court's attention to paragraph eleven of the complaint, "At the time the application was denied, the Beer Board had no evidence before it which justified the denial or showed the granting of the application to sell beer at that location would endanger the public health, safety, morals of Claiborne County."

And in the answer, "The defendants would admit that the denial of the permit was solely on the three hundred foot rule.

THE COURT: That's the only issue then?

MR. STANIFER: Yes, I have looked at the application, your Honor, and that was the only ground for denial on the application.

3. (Opening argument, Tr. page 11, lines 16-17):

THE COURT: There is no question about that. It (location of Frog's Market) is an unzoned, commercial district.

4. (Direct examination of Troy L. Welch, Tr. page 20, lines 15-25; page 21, lines 1-25):

MR. McCORD: . . . Mr. Welch, prior to the time you filed your application – we'll back up and say before the hearing, did you have a conversation with Mr. Fred Chumley about this matter?

A. Yes.

Q. Did you go to him personally as a neighbor and explain to him what you were doing?

A. Yes, sir.

Q. What did Mr. Chumley say to you?

A. Mr. Chumley told me that it was his duty and obligation to his church to fight me.

Q. And did you discuss with the fact that the other two locations and the other two stores right next to you had permits? What did he say about that?

A. He told me that he was fighting them too, he was trying to get rid of them.

Q. Now, Mr. Welch, also prior to the hearing, did a minister come to see you?

A. Yes, sir.

Q. What was his name?

A. His name was Reverend Claude Chumley.

Q. Reverend Claude Chumley. Is he a recognized minister in Claiborne County?

A. Yes, sir.

Q. Do you know whether or not he's related to Mr. Fred Chumley?

A. I think so.

Q. What did he say to you?

A. Reverend Chumley came to my store and asked me if I would drop the case.

Q. All right.

A. He said we – his church was fighting these people, they was trying to limit these beer licenses, that they didn't want them in everyone's hands. I told him that it was legal, and if it was legal we were going to apply for a beer license.

5. (Direct examination of Fred Chumley, Tr. page 23, lines 24-25; page 24, lines 7-15):

MR. STANIFER: Do you know how many feet your residence is located from the building of Frog's Market?

A. It's a hundred and thirty-eight feet.

. . . .

Q. Did you appear before the Claiborne County Beer Board when this application of Mr. Welch was considered?

A. Yes, sir.

Q. Did you object to it then?

A. Yes, sir.

Q. Do you object to it being issued on this day?

A. Yes.

6. (Cross-examination of Fred Chumley, Tr. page 26, lines 8-12):

MR. McCORD: Now, are you related to the Reverend Claude Chumley?

A. Yes.

Q. What is the relation?

A. He's my nephew.

7. (Closing argument, Tr. page 36, lines 11-25; page 37, lines 1-2, 11-21; page 41, lines 14-19):

MR. McCORD: Now, your Honor, also with respect to the constitutionality and due process of this statute, we have to take the word of the (Tennessee) Supreme Court when they say it is constitutional in some respects, but in this particular situation as distinguished from the cases which upheld the statute as being constitutional, in this particular situation the Beer Board didn't exercise any authority. They gave no further consideration. If the Beer Board – if this statute is constitutional for that purpose, then the Beer Board could have acted on that, taking this fact into consideration with other facts, but they didn't do it. And in all the cases where the Supreme Court has upheld the constitutionality of this act, the Beer Board considered other facts. But they didn't do it in this case.

. . . .

And your Honor, there is a recent case in the Supreme Court of the United States, Massachusetts, that's the case of Larkin vs. Grendel's Den, 103 Supreme Court 505, December, 1982, in which the Supreme Court of the United States struck down a Massachusetts statute relative to -- under the first amendment, relative to the separation of church and state, that the church could not dictate under similar rules or determine – you couldn't deny a beer permit because of religious grounds.

. . . .

If it please the Court, two comments: Number one, the Supreme Court case involving the Massachusetts law is a first amendment, but we think the proof in this case today raises the first amendment question, if we get to the constitution.

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No. 84-1093

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TROY L. WELCH and JAY F. WELCH,
Appellants,

vs.

CLAIBORNE COUNTY BEER BOARD, *et al.*,
Appellees.

On Appeal From The Supreme Court Of Tennessee

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether Tennessee Code Annotated § 57-5-105(f), which authorizes certain Tennessee counties to establish a location requirement for the sale of beer, delegates any legislative power to affected nonconsenting residential owners in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

2. Whether an application for a permit to sell beer affords the potential applicant any constitutionally protected liberty or property rights.

3. Whether Tennessee Code Annotated § 57-5-105(f), which is silent as to any church or religious entity, has the effect of advancing religion, favoring one religion over another or results in an excessive entanglement of church and state in violation of the Establishment Clause of the First Amendment.

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No. 84-1093

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vs.

CLAIBORNE COUNTY BEER BOARD, *et al.*,
Appellees.

On Appeal From The Supreme Court Of Tennessee

MOTION TO DISMISS OR AFFIRM

The appellee, W. J. Michael Cody, Attorney General and Reporter for the State of Tennessee, moves this Court pursuant to Rule 16 of the United States Supreme Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Tennessee on the ground that the questions presented here are so unsubstantial as not to warrant further argument.

OPINION BELOW

The October 29, 1984, opinion of the Supreme Court of Tennessee is attached to the appellants' Jurisdictional Statement as Appendix A.

JURISDICTION

Appellants seek to invoke this Court's jurisdiction under 28 U.S.C. § 1257(2).

STATEMENT

Appellants seek a direct appeal from the final judgment and decree of the Tennessee Supreme Court entered October 9, 1984. That ruling upheld the validity of Tennessee Code Annotated § 57-5-105(f) (Supp. 1984) against the appellants' Due Process and Establishment Clause challenges under the United States Constitution.

In July, 1982, appellants applied to the Claiborne County Beer Board for a license to sell beer. Previously, the Board had adopted a resolution pursuant to Tennessee Code Annotated 57-5-105(f) forbidding the sale of beer within 300 feet of a residential dwelling, provided that the residential homeowner appear in person before the County Beer Board and object to the issuance of the permit. At the hearing on the application before the County Beer Board, Mr. Fred Chumley, an owner of a residence within 300 feet of the proposed site for beer sales, appeared and objected to the issuance of the permit. The Chancellor at trial stated that Mr. Chumley's opposition was based on his personal religious beliefs, but that the giving of religious reasons is superflous to the purpose of the statute. The County Beer Board denied the permit.

Appellants filed a petition for a writ of certiorari in the Claiborne County Chancery Court for the purposes of seeking a review of the Beer Board action and questioning the constitutionality of Tennessee Code Annotated § 57-5-105(F) (Supp. 1984). William M. Leech, Jr., then Attorney General and Reporter for the State of Tennessee, intervened in this cause for the sole and limited purpose of defending the constitutionality of the challenged statute. W. J. Michael Cody now serves as the

Tennessee Attorney General and Reporter and has served since July, 1984.

On April 7, 1983, the case came to trial before the Claiborne County Chancery Court which, in a *de novo* hearing, found in favor of the defendants Beer Board and its members and upheld the constitutionality of the challenged statute. On appeal, the Tennessee Supreme Court affirmed.

The Tennessee Supreme Court basically held that (1) the statute does not violate the Due Process Clause because appellants did not meet all the requirements necessary for the issuance of a permit to sell beer, (2) the location prohibition prescribed by the County's resolution adopted pursuant to the state statute is absolute unless waived by an affected residential dweller, (3) a permit to sell beer is a temporary permit and not a right of property, and (4) the challenged statute does not confer a "veto power" upon churches and that First Amendment principles are not involved in this case. The Tennessee Attorney General submits that these issues, having received the full and careful consideration by the Court below, do not raise any doubt as to their disposition before this Court and raise questions so unsubstantial as not to warrant further review.

ARGUMENT

Quite apart from the correctness of the decision below, the appellants raise no issue of general importance warranting this Court's review. Throughout their argument, appellants understate the subject matter involved in this case: licensing the sale of intoxicating beverages. In so doing on the first issue—delegation of legislative power—appellants ignore the absolute legislative prohibition of beer sales at certain locations unless the prohibition is waived by the affected residential landowner. On the second issue, appellants seek an examination of procedural due process in a profession which, in Tennessee, is neither granted nor guaranteed a protected liberty or property interest. Finally, a plain reading of Tennessee Code Annotated Section 57-5-105(f) indicates that an Establishment Clause analysis has no point of origination relative to the challenged statute. Because Section 57-5-105(f) is a reasonable means of regulation in an area where states have wide latitude to regulate, *see generally, California v. LaRue,* 409 U.S. 109 (1972), the legal issues here are unimportant and warrant no further review.

1. Section 57-5-105(f) Does Not Delegate Legislative Authority To Private Individuals In Derogation Of Constitutional Guarantees

Appellants contend that Section 57-5-105(f) authorizes the delegation of legislative authority to private individuals in violation of the Due Process Clause of the Fourteenth Amendment. Appellants assume that a legislative enactment which allows an affected residential landowner to waive a location requirement necessary for a permit to sell beer is constitutionally impermissible. As correctly held by the Court below, appellants' assumption cannot be supported in law on the facts of this case.

At the threshold, this case involves the licensing of applicants for the sale of intoxicating liquors and the police power granted to the states by the Twenty-First Amendment. Although a state's regulation of liquor under that amendment must be exer-

cised consistently with other constitutional provisions, *see Wisconsin v. Constantineau,* 400 U.S. 433, 436 (1971), each constitutional provision "must be considered in the light of the other and in the context of the issues and interests at stake." *Hostetter v. Idelwild Bon Voyage Liquor Corp.,* 377 U.S. 324 (1964).

The Twenty-First Amendment confers on the states exclusive control of the sale of alcoholic beverages, and, in so doing, "something more than the normal state authority over public health, welfare and morals." *California v. LaRue,* 409 U.S. 109, 114 (1972). Moreover, states may, through general ordinances, restrict the commercial use of property, *see Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926), and the geographic location of commercial enterprises. *See Williamson v. Lee Optical Co.,* 348 U.S. 483 (1958). The Tennessee Supreme Court has further stated that the state has the power to restrict the location of establishments for the sale of intoxicating beverages and may require that they be located a particular distance from the property of others. *Davis v. Blount County Beer Board,* 621 S.W.2d 149, 152 (Tenn. 1981).

The legislative provision at issue here is part of a statutory scheme which establishes the minimum requirements for the issuance of a beer permit in certain areas. Tennessee Code Annotated § 57-5-105(Supp. 1984). Subsection 57-5-105(f) sets forth a specific location requirement which, if failed, renders the applicant disqualified. *See Coffman v. Washington County Beer Board,* 615 S.W.2d 675, 677 (Tenn. 1981). The applicant fails to meet the location requirement, in this instance, if a residential landowner within 300 feet of the proposed site appears at the hearing on the application and protests the issuance of the permit.

Therefore, appellants incorrectly contend that an applicant is qualified but for the homeowner's objection. Appearance and protest of the homeowner merely signify to the Beer Board that

an applicant has not met all the requirements necessary for the grant of a permit. Thus, the objection of the homeowner does not restrain appellants from any rights that they may have previously enjoyed or which they may have expected. The next step—denial of the permit's issuance—is a legislative rather than an individual act. The Tennessee Supreme Court has correctly characterized the operation of the statute accordingly: "The effect of a protest is to deny the permit, but that effect is derived from the legislative enactment and the ordinance passed thereto, not from the residence owner." *Davis,* 621 S.W.2d at 152.

It follows that private individuals have no legislative or policy making authority under Section 57-5-105(f). The homeowner's objection merely effectuates the legislative determination that when an owner of a pre-existing residence objects to the sale of beer within 300 feet of his residence, the public interest warrants the prohibition of the issuance of a permit to sell beer. Because the sale of intoxicating liquor has traditionally been viewed as an offensive land use with the potential to interfere with other land uses, *see Mugler v. Kansas,* 123 U.S. 623 (1887); *Thomas Cusack Co. v. City of Chicago,* 242 U.S. 526, 530 (1917), it cannot be said that Section 57-5-105(f) operates arbitrarily or upon an individual's "standardless" whim as appellants contend. In this regard, the statute operates like the ordinance in *Cusack,* the leading case on point.

In *Cusack,* this Court examined and rejected a challenge that a Chicago ordinance conditioning proposed billboard sites on the consent of nearby residential landowners delegated legislative authority to private individuals. In so doing, the Court stated that (1) regulation and control over the construction of billboards was a legitimate exercise of the city's police power, *Cusack,* 242 U.S. at 529-530; and (2) that the consent provision modified an otherwise absolute ban on billboard construction. *Id.* at 531.

These two features are clearly present in the statute in question. As already discussed, the state has broad authority to regulate the sale of alcoholic beverages under the Twenty-First Amendment. Pursuant to this power, the Tennessee Supreme Court has consistently taken the position that the sale of intoxicating liquors is an absolute prohibition relaxed only through the issuance of a permit: "A license to sell liquor [or beer] is not a contract by right of property but is merely a temporary permit to do that which would otherwise be unlawful." *Needham v. Beer Board of Blount County,* 647 S.W.2d 226, 230 (Tenn. 1983); *quoting McClellan v. State of Tennessee,* 199 Tenn. 60, 64, 282 S.W.2d 631 (1958). As such, Section 57-5-105(f) is a clear expression of governmental policy that a license will not issue to locations within 300 feet of a residence in the face of a nonconsenting affected residential landowner.

Appellant's reliance on this Court's holdings in *Eubank v. City of Richmond,* 226 U.S. 137 (1912) and *Washington ex rel Seattle Title Co. v. Roberge,* 278 U.S. 116 (1928) is misplaced. These cases can be distinguished on the equities inherent in their underlying facts. *Eubank* and *Roberge* involved ordinances which substituted private discretion for any official determination of the public interest relative to set-back lines (*Eubank*) and a philanthropic home (*Cusack*). Neither of these decisions indicate that such land uses were public welfare hazards necessitating the invocation of the governing entity's police power. *Eubank,* 226 U.S. at 143-44; *Roberge,* 278 U.S. at 122. The *Cusack* prohibition, however, was said to restrict a deleterious land use which the legislation could regulate to further "the interest of safety, morality, health and decency in the community." *Cusack,* 242 U.S. at 529-30. Because liquor outlets pose a similar threat to the public welfare, *see Id.* at 530, the Tennessee legislature may, under its police powers, likewise condition the imposition of a restriction upon the lack of consent of the parties that the regulation seeks to protect. *Cusack,* 242 U.S. at 531; *see also Eastlake v. Forest City Enterprises, Inc.,* 426 U.S. 668, 677-78 n.12 (1976); *New Motor Vehicle*

Board v. Orrin W. Fox Co., 439 U.S. 96, 109 (1978). Because of the nature of the interests at stake, the challenged legislation is an appropriate instance for a consent provision—a provision which effectuates a reasoned and reasonable legislative policy regarding the sale of alcoholic beverages.

2. Applicants For A Permit To Sell Beer Do Not Have Protected Liberty Or Interests

Appellants next argue that Section 57-5-105(f) deprives them of their liberty to pursue an occupation without due process of law. Appellants contend that absent the objecting resident, they are constitutionally entitled to engage in the business of selling beer.

The argument posed by Appellants assumes that the sale of beer is a common occupation of life when in fact such an occupation is subject to a high degree of supervision and regulation in the interest of the public welfare. *See Oklahoma Alcoholic Beverage Control Board v. Seely,* 621 P.2d 534, 537 (Okla. 1980). Because a state's police power has long included the ability to control and regulate the distribution of liquor within its borders, *see Mugler v. Kansas,* 123 U.S. 623 (1887), a license to sell beer cannot be compared equally to licenses required in common occupations or businesses. *See generally, Patch Enterprises, Inc. v. McCall,* 447 F.Supp. 1075, 1081 (M.D. Fla. 1978).

Appellants' claim of a protected property interest in the beer permit likewise ignores the nature of the interest at stake. Constitutional procedural due process is designed as a safeguard of the security of interests that an individual has already obtained in specific benefits; that is, it is designed for the protection of a "property interest." *Board of Regents v. Roth,* 408 U.S. 564, 576 (1972). The test for determining whether one has a property interest in a benefit is well established:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation. He must instead, have a legitimate claim of entitlement to it....Property interests of course....are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law...

Roth, 408 U.S. at 577.

In order to obtain a license to sell beer, an applicant is required to establish by proof that his application complies with the conditions and provisions set out in Tennessee Code Annotated § 57-5-105. *Cantrell v. DeKalb County Beer Board,* 213 Tenn. 568, 572-73, 376 S.W.2d 480 (1964). Under state law then, the applicant has no more than a unilateral expectation that he will receive his license unless and until he provides sufficient proof that he has complied with all of the requirements of Section 57-5-105. As applicants for the beer permit, then, appellants cannot contend that they had a "legitimate claim of entitlement" to the permit.

Even assuming that the appellants did meet the 300-foot rule location requirement, the law in Tennessee maintains that "there is no property right in a permit to sell beer." *Needham v. Beer Board of Blount County,* 647 S.W.2d 226, 231 (Tenn. 1983). Because a license to sell liquor "is not a contract by right of property but is merely a temporary permit to do that which would otherwise be unlawful," *Id.* at 231, even a licensed operator can be deprived of his license under certain circumstances. *Needham,* 647 S.W.2d at 230.

Because of the character of the interests at stake here, appellants cannot complain that the hearing afforded them by the Beer Board upon denial of the application and the *de novo* hearing in the Trial Court fail to meet the requirements of constitutional due process. Having demonstrated the absence of a protected liberty or property right, appellants have no claim to ad-

ditional procedural safeguards. *See New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 114, (1978) (Blackmun, Powell, J.J., concurring).

3. Section 57-5-105(f) Does Not Violate The Establishment Clause

Appellants' contention that Section 57-5-105(f) violates the Establishment Clause strains any reasonable First Amendment analysis. The Court below "carefully considered" appellants' church and state argument and properly dismissed the contention because "First Amendment principles are not involved here." (*See* Appellants' App. A at A-3.)

Appellants construct their Establishment Clause challenge on the evidentiary inference that the objecting landowner based his objections on religious grounds. The reason for objection has no importance in a discussion of Section 57-5-105(f). Operation of the authorized objection is religion-neutral: an objection for no reason or for a multitude of reasons affects the homeowner protections provided by the legislature. Clearly, the purpose of the statute is secular. Any benefit realized by a church would be too remote or incidental to convert a permissible statute into one violative of the Establishment Clause. *See Zorach v. Clauson,* 343 U.S. 306 (1952)(the policeman who directs traffic on Sunday morning so that parishoners may cross the street to go to church does not represent a violation of the Establishment Clause).

Moreover, the statute does not, and cannot, vest in churches the power to prevent the issuance of a beer permit within a specified area. The operative objection belongs exclusively to the individual homeowner. To suggest that the statute is susceptible to religious ends is to conclude, as appellants must to sustain their argument, that churches can and do direct their parishoner's decisionmaking. Because the decision to object on whatever ground rests ultimately with the homeowner, the statute does not empower a church to advance its interest via

Section 57-5-105(f). For the same reason, the statute does not fuse governmental and religious functions. (*c.f. Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982)(a statute substituting a church's power for the discretionary powers of government held violative of the Establishment Clause). For each of the reasons above, the Court below was correct in its assertion that church and state issues are not present here. Clearly, Section 57-5-105(f) fulfills the criteria stated in *Wolman v. Walter,* 433 U.S. 229, 236 (1977).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the appeal be dismissed, or, in the alternative, the judgment entered by the Supreme Court of Tennessee be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Motion to Dismiss or Affirm has been mailed this 20th day of March, 1985, to the below-referenced counsel.

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